

PROVIDING FOR CONSIDERATION OF H.R. 2269,  
RETIREMENT SECURITY ADVICE ACT OF 2001

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NOVEMBER 14, 2001.—Referred to the House Calendar and ordered to be printed

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Ms. PRYCE of Ohio, from the Committee on Rules,  
submitted the following

R E P O R T

[To accompany H. Res. 288]

The Committee on Rules, having had under consideration House Resolution 288, by a nonrecord vote, report the same to the House with the recommendation that the resolution be adopted.

SUMMARY OF PROVISIONS OF THE RESOLUTION

The resolution provides for consideration in the House of H.R. 2269, the Retirement Security Advice Act of 2001, under a modified closed rule. The rule provides one hundred minutes of debate with sixty minutes equally divided and controlled by the chairman and ranking minority member of the Committee on Education and the Workforce and forty minutes equally divided and controlled by the chairman and ranking minority member of the Committee on Ways and Means. The rule provides that, in lieu of the amendments recommended by the Committee on Education and the Workforce and the Committee on Ways and Means now printed in the bill, the amendment in the nature of a substitute printed in part A of this report shall be considered as adopted. The rule waives all points of order against consideration of the bill as amended.

The rule further provides for consideration of the amendment printed in part B of this report if offered by Representative George Miller of California or his designee, which shall be considered as read and shall be separately debatable for one hour equally divided and controlled by the proponent and an opponent. The rule waives all points of order against the amendment printed in part B of this report. Finally, the rule provides one motion to recommit with or without instructions.

## SUMMARY OF AMENDMENTS MADE IN ORDER UNDER THE RULE

(Summaries derived from information provided by amendment sponsors.)

## PART A

*Summary of amendment to be considered as adopted*

Amendment in the Nature of a Substitute. Combines the provisions reported by the Committee on Education and the Workforce and the Committee on Ways and Means. Provides a statutory exemption from the prohibited transaction rules of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC) for: the provision of investment advice regarding plan assets subject to the direction of plan participants and beneficiaries to a plan, its participants and beneficiaries; the sale, acquisition, or holding of securities or other property pursuant to such investment advice; and the direct or indirect receipt for fees or other compensation in connection with providing the advice. Requires an entity to be a “fiduciary adviser” and meet a series of detailed requirements to qualify for an exemption. Requires the fiduciary adviser to provide a clear and conspicuous written (including electronic) disclosure of: the fees or other compensation that the fiduciary adviser and its affiliates receive relating to the provision of investment advice or a resulting sale or acquisition of securities or other property (including from third parties); any interest of the fiduciary adviser (and its affiliates) in any security or other property recommended, purchased or sold; any limitation placed on the fiduciary’s ability to provide advice; the advisory services offered; that the adviser is acting as a fiduciary of the plan in connection with the provision of such advice; and any information required to be disclosed under applicable securities laws. Requires that this disclosure must be made at a time reasonably contemporaneous with the initial provision of advice and annually thereafter, or if there is a material change or at the participant’s request, and that the disclosure must be written in a way that the average plan participant could understand the information. Requires that the terms of the transaction be at least as favorable to the plan as an arm’s length transaction would be, and the compensation received by the fiduciary adviser (and its affiliates) in connection with any transaction to be reasonable. Also requires the fiduciary adviser to provide a written acknowledgment that it is acting as a fiduciary of the plan to the plan sponsor and to comply with a 6-year record-keeping requirement (for records necessary to determine whether the conditions of the exemption have been met). Provides that a plan sponsor or other fiduciary that arranges for a fiduciary adviser to provide investment advice to participants and beneficiaries has no duty to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of advice, but the plan sponsor or other fiduciary retains the duty of prudent selection and periodic review of the fiduciary adviser.

## PART B

*Summary of amendment made in order under the rule*

George Miller, Democratic Substitute. Under the Democratic substitute, the prohibited transaction rules under section 4975 of the Internal Revenue Code, and sections 406 and 408 of the Employee Retirement Security Act (ERISA) would be waived if the following requirements are met:

1. *Disclosure*: At the time of providing advice with regard to the sale, acquisition, or holding of the security or other property, the advisor would be required to provide the plan participant or beneficiary under the plan with a clear and conspicuous notification of the factors set forth below. The disclosure could be written or provided by electronic means in a manner to be reasonably understood by the average plan participant. The Secretary would be required to provide a model disclosure form pursuant to regulations. The model disclosure form would include mathematical examples that are understood by the average plan participant.

The advisor would be required to disclose any interest of such advisor, or any affiliation or contractual relationship of the advisor with any third party who has an interest in the security or other property. The advisor also would be required to disclose all fees and other compensations (including ongoing fees and compensation) relating to the advice that the advisor (or any affiliate) is to receive in connection with providing advice, or in connection with the sale, acquisition, or holding of the security or other property.

2. *Available option for independent advisor*: In cases where the advisor has an interest in the security or other property, or has an affiliation or contractual relationship with any third party that has an interest in the security or other property, the advisor would be required to arrange, as an alternative to the advice that would otherwise be provided by the advisor, qualified investment advice with respect to the security or the other property provided by at least one alternative investment advisor meeting the qualification requirements set forth in the bill.

The alternative independent advice would be provided under the same terms and conditions, including no additional charge to the participant or beneficiary, as apply with respect to the investment advice to be provided by the advisor.

3. *Qualification of individuals providing advice*: An individual providing investment advice would be required to be (1) registered as an investment advisor under the Investment Advisers Act of 1940, (2) if not registered under such act, registered under the laws of the state in which the fiduciary maintains its principal office and place of business, (3) registered as a broker or dealer under the Securities Exchange Act of 1934, (4) a bank or similar financial institution as defined in the Investment Advisers Act of 1940, (5) an insurance company qualified to do business under the laws of the state, or (6) any other comparable qualified entity which satisfies such criteria as the Secretary determines appropriate.

Additional requirements would be imposed on employees of the entities listed above, and whose duties include providing qualified investment advice. Such individuals would be required to be (a) registered under the Investment Advisers Act or under state laws as previously provided, (b) a registered broker or dealer under the

Securities Exchange Act, or (c) meet such other comparable standard as set forth by the Secretary.

4. *Remedies available to plan participant:* The plan participant who successfully brings a cause of action under ERISA against the fiduciary for a breach of fiduciary duty would be entitled to recover, from the advisor, any economic loss suffered as a result of such breach.

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TEXT OF AMENDMENT TO BE CONSIDERED AS ADOPTED

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Retirement Security Advice Act of 2001”.

**SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR THE PROVISION OF INVESTMENT ADVICE.**

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) EXEMPTION FROM PROHIBITED TRANSACTIONS.—Section 408(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following new paragraph:

“(14)(A) Any transaction described in subparagraph (B) in connection with the provision of investment advice described in section 3(21)(A)(ii), in any case in which—

“(i) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,

“(ii) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

“(iii) the requirements of subsection (g) are met in connection with the provision of the advice.

“(B) The transactions described in this subparagraph are the following:

“(i) the provision of the advice to the plan, participant, or beneficiary;

“(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

“(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.”.

(2) REQUIREMENTS.—Section 408 of such Act is amended further by adding at the end the following new subsection:

“(g) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—

“(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of investment advice referred to in section 3(21)(A)(ii), provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

“(A) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

“(i) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

“(ii) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

“(iii) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

“(iv) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser, and

“(v) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice,

“(B) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

“(C) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

“(D) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

“(E) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm’s length transaction would be.

“(2) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under paragraph (1)(A) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

“(3) EXEMPTION CONDITIONED ON CONTINUED AVAILABILITY OF REQUIRED INFORMATION ON REQUEST FOR 1 YEAR.—The requirements of paragraph (1)(A) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in paragraph (1) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form and in the manner described in paragraph (2) or fails—

“(A) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

“(B) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

“(C) in the event of a material change to the information described in clauses (i) through (iv) of paragraph (1)(A), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

“(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

“(5) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—

“(A) IN GENERAL.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

“(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

“(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

“(iii) the terms of the arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

“(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—Nothing in subparagraph

(A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

“(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

“(6) DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

“(A) FIDUCIARY ADVISER.—The term ‘fiduciary adviser’ means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—

“(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

“(ii) a bank or similar financial institution referred to in section 408(b)(4),

“(iii) an insurance company qualified to do business under the laws of a State,

“(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

“(v) an affiliate of a person described in any of clauses (i) through (iv), or

“(vi) an employee, agent, or registered representative of a person described in any of clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

“(B) AFFILIATE.—The term ‘affiliate’ of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

“(C) REGISTERED REPRESENTATIVE.—The term ‘registered representative’ of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).”.

(b) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) EXEMPTION FROM PROHIBITED TRANSACTIONS.—Subsection (d) of section 4975 of the Internal Revenue Code of 1986 (relat-

ing to exemptions from tax on prohibited transactions) is amended—

(A) in paragraph (14), by striking “or” at the end;

(B) in paragraph (15), by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following new paragraph:

“(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B), in any case in which—

“(A) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,

“(B) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

“(C) the requirements of subsection (f)(7)(B) are met in connection with the provision of the advice.”

(2) ALLOWED TRANSACTIONS AND REQUIREMENTS.—Subsection (f) of such section 4975 (relating to other definitions and special rules) is amended by adding at the end the following new paragraph:

“(7) PROVISIONS RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

“(A) TRANSACTIONS ALLOWABLE IN CONNECTION WITH INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—The transactions referred to in subsection (d)(16), in connection with the provision of investment advice by a fiduciary adviser, are the following:

“(i) the provision of the advice to the plan, participant, or beneficiary;

“(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

“(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

“(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

“(i) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary,



the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

“(I) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

“(II) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

“(III) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

“(IV) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser, and

“(V) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice,

“(ii) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

“(iii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

“(iv) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

“(v) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm’s length transaction would be.

“(C) STANDARDS FOR PRESENTATION OF INFORMATION.—

The notification required to be provided to participants and beneficiaries under subparagraph (B)(i) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

“(D) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary,

the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—

“(i) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

“(ii) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

“(iii) in the event of a material change to the information described in subclauses (I) through (IV) of subparagraph (B)(i), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

“(E) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

“(F) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—A plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this section solely by reason of the provision of investment advice referred to in subsection (e)(3)(B) (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

“(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

“(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this paragraph,

“(iii) the terms of the arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice, and

“(iv) the requirements of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 are met in connection with the provision of such advice.

“(G) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

“(i) FIDUCIARY ADVISER.—The term ‘fiduciary adviser’ means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—

“(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

“(II) a bank or similar financial institution referred to in subsection (d)(4),

“(III) an insurance company qualified to do business under the laws of a State,

“(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

“(V) an affiliate of a person described in any of subclauses (I) through (IV), or

“(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

“(ii) AFFILIATE.—The term ‘affiliate’ of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

“(iii) REGISTERED REPRESENTATIVE.—The term ‘registered representative’ of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).”

### **SEC. 3. EFFECTIVE DATE.**

The amendments made by this Act shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 or section 4975(e)(3)(B) of the Internal Revenue Code of 1986 provided on or after January 1, 2002.

### **TEXT OF AMENDMENT MADE IN ORDER UNDER THE RULE**

**AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE GEORGE MILLER OF CALIFORNIA, OR A DESIGNEE, DEBATABLE FOR 60 MINUTES**

Strike all after the enacting clause and insert the following:

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the “Retirement Security Advice Act of 2001”.

**SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR THE PROVISION OF INVESTMENT ADVICE.**

(a) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) IN GENERAL.—Subsection (d) of section 4975 of the Internal Revenue Code of 1986 (relating to exemptions from tax on prohibited transactions) is amended by striking “or” at the end of paragraph (14), by striking the period at the end of paragraph (15) and inserting “; or”; and by adding at the end the following new paragraph:

“(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B), in any case in which—

“(A) the plan provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his or her account,

“(B) the advice is qualified investment advice provided to a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

“(C) the requirements of subsection (f)(7)(B) are met in connection with each instance of the provision of the advice.”.

(2) RULES RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—Subsection (f) of section 4975 of such Code (relating to other definitions and special rules) is amended by adding at the end the following new paragraph:

“(7) INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

“(A) ALLOWABLE TRANSACTIONS.—The transactions described in this subsection, in connection with the provision of investment advice by a fiduciary adviser, are the following:

“(i) the provision of the advice to the participant or beneficiary;

“(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

“(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice.

“(B) REQUIREMENTS FOR EXEMPTION FROM PROHIBITED TRANSACTIONS WITH RESPECT TO PROVISION OF INVESTMENT ADVICE.—The requirements of this subparagraph are met in connection with the provision of qualified investment advice provided to a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if the requirements of the following clauses are met:

“(i) WRITTEN OR ELECTRONIC DISCLOSURES.—At a time contemporaneous with the provision of the advice in connection with the sale, acquisition, or holding of the security or other property, the fiduciary adviser shall provide to the recipient of the advice a clear and conspicuous notification, written (or by electronic means) in a manner to be reasonably understood by the average plan participant pursuant to regulations which shall be prescribed by the Secretary (including mathematical examples), of the following:

“(I) INTERESTS HELD BY THE FIDUCIARY ADVISER.—Any interest of the fiduciary adviser in, or any affiliation or contractual relationship of the fiduciary adviser (or affiliates thereof) with any third party having an interest in, the security or other property.

“(II) RELATED FEES OR COMPENSATION IN CONNECTION WITH THE PROVISION OF THE ADVICE.—All fees or other compensation relating to the advice (including fees or other compensation itemized with respect to each security or other property with respect to which the advice is provided) that the fiduciary adviser (or any affiliate thereof) is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property.

“(III) ONGOING FEES OR COMPENSATION IN CONNECTION WITH THE SECURITY OR PROPERTY INVOLVED.—All fees or other compensation that the fiduciary adviser (or any affiliate thereof) is to receive, on an ongoing basis, in connection with any security or other property with respect to which the fiduciary adviser gives the advice.

“(IV) APPLICABLE LIMITATIONS ON SCOPE OF ADVICE.—Any limitation placed (in accordance with the requirements of this subsection) on the scope of the advice to be provided by the fiduciary adviser with respect to the sale, acquisition, or holding of the security or other property.

“(V) TYPES OF SERVICES GENERALLY OFFERED.—The types of services offered by the fiduciary adviser in connection with the provision of qualified investment advice by the fiduciary adviser.

“(VI) FIDUCIARY STATUS OF THE FIDUCIARY ADVISER.—That the fiduciary advisor is a fiduciary of the plan.

“(ii) DISCLOSURE BY FIDUCIARY ADVISER IN ACCORDANCE WITH APPLICABLE SECURITIES LAWS.—The fiduciary adviser shall provide appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws.

“(iii) TRANSACTION OCCURRING SOLELY AT DIRECTION OF RECIPIENT OF ADVICE.—The sale, acquisition, or

holding of the security or other property shall occur solely at the direction of the recipient of the advice.

“(iv) REASONABLE COMPENSATION.—The compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property shall be reasonable.

“(v) ARM’S LENGTH TRANSACTION.—The terms of the sale, acquisition, or holding of the security or other property shall be at least as favorable to the plan as an arm’s length transaction would be.

“(C) CONTINUED AVAILABILITY OF INFORMATION FOR AT LEAST 1 YEAR.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) if, at any time during the 1-year period following the provision of the advice, the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form or to make the information available, upon request and without charge, to the recipient of the advice.

“(D) EVIDENCE OF COMPLIANCE MAINTAINED FOR AT LEAST 6 YEARS.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

“(E) MODEL DISCLOSURE FORMS.—The Secretary shall prescribe regulations setting forth model disclosure forms to assist fiduciary advisers in complying with the disclosure requirements under this paragraph.

“(F) ANNUAL REVIEWS BY THE SECRETARY.—The Secretary shall conduct annual reviews of randomly selected fiduciary advisers providing qualified investment advice to participants and beneficiaries. In the case of each review, the Secretary shall review the following:

“(i) COMPLIANCE BY ADVICE COMPUTER MODELS WITH REASONABLE INVESTMENT METHODOLOGIES.—The extent to which advice computer models employed by the fiduciary adviser comply with reasonable investment methodologies.

“(ii) COMPLIANCE WITH DISCLOSURE REQUIREMENTS.—The extent to which disclosures provided by the fiduciary adviser have complied with the requirements of this subsection.

“(iii) EXTENT OF VIOLATIONS.—The extent to which any violations of fiduciary duties have occurred in connection with the provision of the advice.

“(iv) EXTENT OF REPORTED COMPLAINTS.—The extent to which complaints to relevant agencies have been made in connection with the provision of the advice. Any proprietary information obtained by the Secretary shall be treated as confidential.

“(G) DUTY OF CONFLICTED FIDUCIARY ADVISER TO PROVIDE FOR ALTERNATIVE INDEPENDENT ADVICE.—

“(i) IN GENERAL.—In connection with any qualified investment advice provided by a fiduciary adviser to a participant or beneficiary regarding any security or other property, if the fiduciary adviser—

“(I) has an interest in the security or other property, or

“(II) has an affiliation or contractual relationship with any third party that has an interest in the security or other property,

the requirements of subparagraph (B) shall be treated as not met in connection with the advice unless the fiduciary adviser has arranged, as an alternative to the advice that would otherwise be provided by the fiduciary adviser, for qualified investment advice with respect to the security or other property provided by at least one alternative investment adviser meeting the requirements of clause (ii).

“(ii) INDEPENDENCE AND QUALIFICATIONS OF ALTERNATIVE INVESTMENT ADVISER.—Any alternative investment adviser whose qualified investment advice is arranged for by a fiduciary adviser pursuant to clause (i)—

“(I) shall have no material interest in, and no material affiliation or contractual relationship with any third party having a material interest in, the security or other property with respect to which the investment adviser is providing the advice, and

“(II) shall meet the requirements of a fiduciary adviser under subparagraph (H)(ii) and (iii), except that an alternative investment adviser may not be a fiduciary of the plan other than in connection with the provision of the advice.

“(iii) SCOPE AND FEES OF ALTERNATIVE INVESTMENT ADVICE.—Any qualified investment advice provided pursuant to this subparagraph by an alternative investment adviser shall be of the same type and scope, and provided under the same terms and conditions (including no additional charge to the participant or beneficiary), as apply with respect to the qualified investment advice to be provided by the fiduciary adviser.

“(H) FIDUCIARY ADVISER DEFINED.—For purposes of this paragraph and subsection (d)(16)—

“(i) IN GENERAL.—The term ‘fiduciary adviser’ means, with respect to a plan, a person who—

“(I) is a fiduciary of the plan by reason of the provision of qualified investment advice by such person to a participant or beneficiary,

“(II) meets the qualifications of clause (ii), and

“(III) meets the additional requirements of clause (iii).

“(ii) QUALIFICATIONS.—A person meets the qualifications of this clause if such person—

“(I) is registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.),

“(II) if not registered as an investment adviser under such Act by reason of section 203A(a)(1) of such Act (15 U.S.C. 80b–3a(a)(1)), is registered under the laws of the State in which the fiduciary maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary’s registration under the laws of such State, also filed a copy of such form with the Secretary,

“(III) is registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

“(IV) is a bank or similar financial institution referred to in subsection (d)(4),

“(V) is an insurance company qualified to do business under the laws of a State, or

“(VI) is any other comparable qualified entity which satisfies such criteria as the Secretary determines appropriate consistent with the purpose of this subsection.

“(iii) ADDITIONAL REQUIREMENTS WITH RESPECT TO CERTAIN EMPLOYEES OR OTHER AGENTS OF CERTAIN ADVISERS.—A person meets the additional requirements of this clause if every individual who is employed (or otherwise compensated) by such person and whose scope of duties includes the provision of qualified investment advice on behalf of such person to any participant or beneficiary is—

“(I) a registered representative of such person,

“(II) an individual described in subclause (I), (II), or (III) of clause (ii), or

“(III) such other comparable qualified individual who satisfies such criteria as the Secretary determines appropriate consistent with the purpose of this subsection.

“(I) ADDITIONAL DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

“(i) QUALIFIED INVESTMENT ADVICE.—The term ‘qualified investment advice’ means, in connection with a participant or beneficiary, investment advice referred to in subsection (e)(3)(B) which—

“(I) consists of an individualized recommendation to the participant or beneficiary with respect to the purchase, sale, or retention of securities or other property for the individual account of the



participant or beneficiary, in accordance with generally accepted investment management principles, and

“(II) takes into account all investment options under the plan.

“(ii) REGISTERED REPRESENTATIVE.—The term ‘registered representative’ of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting such entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting such entity for the investment adviser referred to in such section).”.

(3) ASSUMPTION OF LIABILITY.—Subsection (b) of section 4975 of such Code is amended—

(A) by striking “PERSON.—In” and inserting “PERSON.—

“(1) IN GENERAL.—In”, and moving the text 2 ems to the right, and

(B) by adding at the end the following new paragraph:

“(2) ASSUMPTION OF LIABILITY.—If a court determines that a fiduciary advisor has breached his fiduciary responsibility as a result of a failure to meet the requirements of subparagraph (B), (C), (D), or (G) of subsection (e)(7), then, notwithstanding any other provision of this title or the Employee Retirement Income Security Act of 1974, the fiduciary advisor shall be liable for any monetary losses suffered by a participant or beneficiary as a result of such breach.”.

(b) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) IN GENERAL.—Section 408(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following new paragraph:

“(14)(A) Any transaction described in subparagraph (B) in connection with the provision of investment advice described in section 3(21)(A)(ii), in any case in which—

“(i) the plan provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his or her account,

“(ii) the advice is qualified investment advice provided to a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

“(iii) the requirements of subsection (g) are met in connection with each instance of the provision of the advice.

“(B) The transactions described in this subparagraph are the following:

“(i) the provision of the advice to the participant or beneficiary;

“(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

“(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice.”.

(2) REQUIREMENTS.—Section 408 of such Act is amended further by adding at the end the following new subsection:

“(g) REQUIREMENTS FOR EXEMPTION FROM PROHIBITED TRANSACTIONS WITH RESPECT TO PROVISION OF INVESTMENT ADVICE.—

“(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of qualified investment advice provided to a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if the requirements of the following subparagraphs are met:

“(A) WRITTEN DISCLOSURES.—At a time contemporaneous with the provision of the advice in connection with the sale, acquisition, or holding of the security or other property, the fiduciary adviser shall provide to the recipient of the advice a clear and conspicuous notification, written in a manner to be reasonably understood by the average plan participant pursuant to regulations which shall be prescribed by the Secretary (including mathematical examples), of the following:

“(i) INTERESTS HELD BY THE FIDUCIARY ADVISER.—Any interest of the fiduciary adviser in, or any affiliation or contractual relationship of the fiduciary adviser (or affiliates thereof) with any third party having an interest in, the security or other property.

“(ii) RELATED FEES OR COMPENSATION IN CONNECTION WITH THE PROVISION OF THE ADVICE.—All fees or other compensation relating to the advice (including fees or other compensation itemized with respect to each security or other property with respect to which the advice is provided) that the fiduciary adviser (or any affiliate thereof) is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property.

“(iii) ONGOING FEES OR COMPENSATION IN CONNECTION WITH THE SECURITY OR PROPERTY INVOLVED.—All fees or other compensation that the fiduciary adviser (or any affiliate thereof) is to receive, on an ongoing basis, in connection with any security or other property with respect to which the fiduciary adviser gives the advice.

“(iv) APPLICABLE LIMITATIONS ON SCOPE OF ADVICE.—Any limitation placed (in accordance with the requirements of this subsection) on the scope of the advice to be provided by the fiduciary adviser with respect to the sale, acquisition, or holding of the security or other property.

“(v) TYPES OF SERVICES GENERALLY OFFERED.—The types of services offered by the fiduciary adviser in connection with the provision of qualified investment advice by the fiduciary adviser.

“(vi) FIDUCIARY STATUS OF THE FIDUCIARY ADVISER.—That the fiduciary advisor is a fiduciary of the plan.

“(B) DISCLOSURE BY FIDUCIARY ADVISER IN ACCORDANCE WITH APPLICABLE SECURITIES LAWS.—The fiduciary adviser shall provide appropriate disclosure, in connection with any the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws.

“(C) TRANSACTION OCCURRING SOLELY AT DIRECTION OF RECIPIENT OF ADVICE.—The sale, acquisition, or holding of the security or other property shall occur solely at the direction of the recipient of the advice.

“(D) REASONABLE COMPENSATION.—The compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property shall be reasonable.

“(F) ARM’S LENGTH TRANSACTION.—The terms of the sale, acquisition, or holding of the security or other property shall be at least as favorable to the plan as an arm’s length transaction would be.

“(2) CONTINUED AVAILABILITY OF INFORMATION FOR AT LEAST 1 YEAR.—The requirements of paragraph (1)(A) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in paragraph (1) if, at any time during the 1-year period following the provision of the advice, the fiduciary adviser fails to maintain the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form or to make the information available, upon request and without charge, to the recipient of the advice.

“(3) EVIDENCE OF COMPLIANCE MAINTAINED FOR AT LEAST 6 YEARS.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

“(4) MODEL DISCLOSURE FORMS.—The Secretary shall prescribe regulations setting forth model disclosure forms to assist fiduciary advisers in complying with the disclosure requirements of under this subsection.

“(5) EXEMPTION FOR EMPLOYERS CONTRACTING FOR QUALIFIED INVESTMENT ADVICE.—

“(A) RELIANCE ON CONTRACTUAL ARRANGEMENTS.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part

solely by reason of the provision of qualified investment advice (or solely by reason of contracting for or otherwise arranging for the provision of the investment advice), if—

“(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of qualified investment advice, and

“(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this subsection.

“(B) CONTINUED DUTY FOR EMPLOYER TO PRUDENTLY SELECT AND REVIEW FIDUCIARY ADVISERS.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of qualified investment advice. The plan sponsor or other person who is a fiduciary shall not be liable under this part with respect to the specific qualified investment advice given by the fiduciary adviser to any particular recipient of the advice. Pursuant to regulations which shall be prescribed by the Secretary, the fiduciary adviser shall provide appropriate disclosures to the plan sponsor to enable the plan sponsor to fulfill its fiduciary responsibilities under this part. In connection with the provision of the advice by a fiduciary adviser on an ongoing basis, such regulations shall provide for such disclosures on at least an annual basis.

“(C) PLAN ASSETS MAY BE USED TO PAY REASONABLE EXPENSES.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing qualified investment advice.

“(6) ANNUAL REVIEWS BY THE SECRETARY.—The Secretary shall conduct annual reviews of randomly selected fiduciary advisers providing qualified investment advice to participants and beneficiaries. In the case of each review, the Secretary shall review the following:

“(A) COMPLIANCE BY ADVICE COMPUTER MODELS WITH GENERALLY ACCEPTED INVESTMENT MANAGEMENT PRINCIPLES.—The extent to which advice computer models employed by the fiduciary adviser comply with generally accepted investment management principles.

“(B) COMPLIANCE WITH DISCLOSURE REQUIREMENTS.—The extent to which disclosures provided by the fiduciary adviser have complied with the requirements of this subsection.

“(C) EXTENT OF VIOLATIONS.—The extent to which any violations of fiduciary duties have occurred in connection with the provision of the advice.

“(D) EXTENT OF REPORTED COMPLAINTS.—The extent to which complaints to relevant agencies have been made in connection with the provision of the advice.

Any proprietary information obtained by the Secretary shall be treated as confidential.

“(7) DUTY OF CONFLICTED FIDUCIARY ADVISER TO PROVIDE FOR ALTERNATIVE INDEPENDENT ADVICE.—

“(A) IN GENERAL.—In connection with any qualified investment advice provided by a fiduciary adviser to a participant or beneficiary regarding any security or other property, if the fiduciary adviser—

“(i) has an interest in the security or other property, or

“(ii) has an affiliation or contractual relationship with any third party that has an interest in the security or other property,

the requirements of paragraph (1) shall be treated as not met in connection with the advice unless the fiduciary adviser has arranged, as an alternative to the advice that would otherwise be provided by the fiduciary advisor, for qualified investment advice with respect to the security or other property provided by at least one alternative investment adviser meeting the requirements of subparagraph (B).

“(B) INDEPENDENCE AND QUALIFICATIONS OF ALTERNATIVE INVESTMENT ADVISER.—Any alternative investment adviser whose qualified investment advice is arranged for by a fiduciary adviser pursuant to subparagraph (A)—

“(i) shall have no material interest in, and no material affiliation or contractual relationship with any third party having a material interest in, the security or other property with respect to which the investment adviser is providing the advice, and

“(ii) shall meet the requirements of a fiduciary adviser under paragraph (7)(A), except that an alternative investment adviser may not be a fiduciary of the plan other than in connection with the provision of the advice.

“(C) SCOPE AND FEES OF ALTERNATIVE INVESTMENT ADVICE.—Any qualified investment advice provided pursuant to this paragraph by an alternative investment adviser shall be of the same type and scope, and provided under the same terms and conditions (including no additional charge to the participant or beneficiary), as apply with respect to the qualified investment advice to be provided by the fiduciary adviser.

“(8) FIDUCIARY ADVISER DEFINED.—For purposes of this subsection and subsection (b)(14)—

“(A) IN GENERAL.—The term ‘fiduciary adviser’ means, with respect to a plan, a person—

“(i) who is a fiduciary of the plan by reason of the provision of qualified investment advice by such person to a participant or beneficiary,

“(ii) who—

“(I) is registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.),

“(II) if not registered as an investment adviser under such Act by reason of section 203A(a)(1) of such Act (15 U.S.C. 80b-3a(a)(1)), is registered under the laws of the State in which the fiduciary maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary’s registration under the laws of such State, also filed a copy of such form with the Secretary,

“(III) is registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

“(IV) is a bank or similar financial institution referred to in section 408(b)(4),

“(V) is an insurance company qualified to do business under the laws of a State, or

“(VI) is any other comparable entity which satisfies such criteria as the Secretary determines appropriate, and

“(iii) who is an entity meeting the requirements of subparagraph (B).

“(B) ADDITIONAL REQUIREMENTS WITH RESPECT TO CERTAIN EMPLOYEES OR OTHER AGENTS OF CERTAIN ADVISERS.—The requirements of this subparagraph are met if every individual who is employed (or otherwise compensated) by a person described subparagraph (A)(ii) and whose scope of duties includes the provision of qualified investment advice on behalf of such person to any participant or beneficiary is—

“(i) a registered representative of such person,

“(ii) an individual described in subclause (I), (II), or (III) of subparagraph (A)(ii), or

“(iii) such other comparable qualified individual as may be designated in regulations of the Secretary.

“(9) ADDITIONAL DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

“(A) QUALIFIED INVESTMENT ADVICE.—The term ‘qualified investment advice’ means, in connection with a participant or beneficiary, investment advice referred to in section 3(21)(A)(ii) which—

“(i) consists of an individualized recommendation to the participant or beneficiary with respect to the purchase, sale, or retention of securities or other property for the individual account of the participant or beneficiary, in accordance with generally accepted investment management principles, and

“(ii) takes into account all investment options under the plan.

“(B) AFFILIATE.—The term ‘affiliate’ of another entity means an affiliated person of such entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3))).

“(C) REGISTERED REPRESENTATIVE.—The term ‘registered representative’ of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting such entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting such entity for the investment adviser referred to in such section).”.

(c) ENFORCEMENT.—

(1) LIABILITY FOR BREACH.—

(A) LIABILITY IN CONNECTION WITH INDIVIDUAL ACCOUNT PLANS.—Section 409 of such Act (29 U.S.C. 1109) is amended by adding at the end the following new subsection:

“(c)(1) In any case in which the provision by a fiduciary adviser of qualified investment advice to a participant or beneficiary regarding any security or other property consists of a breach described in subsection (a), the fiduciary adviser shall be personally liable to make good to the individual account of the participant or beneficiary any losses to the individual account resulting from the breach, and to restore to the individual account any profits of the fiduciary adviser which have been made through use of assets of the individual account by—

“(A) the fiduciary adviser, or

“(B) any other party with respect to whom a material affiliation or contractual relationship of the fiduciary adviser resulted in a violation of section 408(g)(1)(A) in connection with the advice.

“(2) In the case of any action under this title by a participant or beneficiary against a fiduciary adviser for relief under this subsection in connection with the provision of any qualified investment advice—

“(A) if the participant or beneficiary shows that the fiduciary adviser had any interest in, or had any affiliation or contractual relationship with a third party having an interest in, the security or other property, there shall be a presumption (rebuttable by a preponderance of the evidence) that the fiduciary adviser failed to meet the requirements of subparagraphs (A) and (B) of section 404(a)(1) in connection with the provision of the advice, and

“(B) the dispute may be settled by arbitration, but only pursuant to terms and conditions established by agreement entered into voluntarily by both parties after the commencement of the dispute.

“(3) For purposes of this subsection, the terms ‘fiduciary adviser’ and ‘qualified investment advice’ shall have the meanings provided such terms in subparagraphs (A) and (B), respectively, of section 406(g)(7).”.

(B) LIMITATION ON EXEMPTION FROM LIABILITY.—Section 404(c) of such Act (29 U.S.C. 1104(c)) is amended—

(i) by redesignating paragraph (2) as paragraph (3) (and by adjusting the margination of such paragraph to full measure and adjusting the margination of subparagraphs (A) through (B) thereof accordingly); and

(ii) by inserting after paragraph (1) the following new paragraph:

“(2)(A) In any case in which—

“(i) a participant or beneficiary exercises control over the assets in his or her account by means of a sale, acquisition, or holding of a security or other property with regard to which qualified investment advice was provided by a fiduciary adviser, and

“(ii) any transaction in connection with the exercise of such control is not a prohibited transaction solely by reason of section 408(b)(14),

paragraph (1) shall not apply with respect to the fiduciary adviser in connection with the provision of the advice.

“(B) For purposes of this subsection, the terms ‘fiduciary adviser’ and ‘qualified investment advice’ shall have the meanings provided such terms in subparagraphs (A) and (B), respectively, of section 408(g)(7).”.

(2) ATTORNEY’S FEES.—Section 502(g) of such Act (29 U.S.C. 1132(g)) is amended—

(A) in paragraph (1), by inserting “or (3)” after “paragraph (2)”; and

(B) by adding at the end the following new paragraph:

“(3) In any action under this title by the participant or beneficiary against a fiduciary adviser for relief under section 409(c) in which the plaintiff prevails, the court shall allow a reasonable attorney’s fee and costs of action to the prevailing plaintiff.”.

(3) APPLICABILITY OF STATE FRAUD LAWS.—Section 514(b) of such Act (29 U.S.C. 1144(b)) is amended—

(A) by redesignating paragraph (9) as paragraph (10); and

(B) by inserting after paragraph (8) the following new paragraph:

“(9) Nothing in this title shall be construed to supersede any State action for fraud against a fiduciary adviser for any act or failure to act by the fiduciary adviser constituting a violation of section 409(c).”.

### SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 or section 4975(e)(3)(B) of the Internal Revenue Code of 1986 provided on or after January 1, 2002.